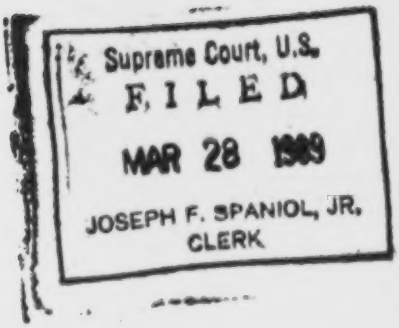
88-1598



CASE NUMBER

SUPREME COURT OF THE UNITED STATES
OCTOBER 1988 TERM

IN RE TWYLAH SUE HOOKER

EXTRAORDINARY WRIT FROM
THE UNITED STATES DISTRICT COURT OF
THE EASTERN DISTRICT OF OKLAHOMA

PETITION FOR WRIT IN THE NATURE OF PROHIBITION OR MANDAMUS

Walter D. Haskins, OBA #3964
THOMAS, GLASS, ATKINSON, HASKINS,
NELLIS & BOUDREAUX
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(918) 582-8877

Counsel of Record for Petitioner

55 pp

QUESTION PRESENTED FOR REVIEW

Whether the district court denied the Petitioner her Constitutional Right to due process by entering an Order consolidating her cases filed in the Eastern District, based on Petitioner's failure to respond, prior to the time a timely response was required under the district court's local rules and the Federal Rules of Civil Procedure.

LIST OF PARTIES TO THE PROCEEDING

1. Frank H. Seay, Chief Judge of the United States District Court for the Eastern District of Oklahoma

2. Continental Life Insurance Company, a Texas corporation

3. Transport Life Insurance Company, a Texas corporation

4. Twylah Sue Hooker, a citizen of the State of Oklahoma

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS BELOW AND INCLUDED IN THE APPENDIX

1. Tenth Circuit Court of Appeals, case number 88-2804, February 10, 1989, denying Petitioner's Application to Assume Original Jurisdiction, which Opinion is reproduced in the Appendix herein.

2. United States District Court for the Eastern District of Oklahoma, case number 88-435-C, September 8, 1988, granting Defendants' Motion to Consolidate.

3. United States District Court for the Eastern District of Oklahoma, case number 88-171-C and 88-435-C (consolidated), September 28, 2988, denying Plaintiff's Motion to Reconsider Consolidation of cases .

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

Jurisdiction of this Court is invoked pursuant to the All Writs Act, 28 U.S.C. § 1651(a) . In this case, the Tenth Circuit Court of Appeals denied Petitioner's Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and or Prohibition on February 10, 1989. Pursuant to 28 U.S.C. § 2101(c), Petitioner has ninety days from the entry of the Order to bring this original action before the Supreme Court. In the original actions in the district court, jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1).

SUPREME COURT OF THE UNITED STATES

IN RE: TWYLAH SUE HOOKER,)
)
)
)
Petitioner,) No.

Jurisdiction of this Court is invoked pursuant to the All Writs Act, 28 U.S.C. § 1651(a). In this case, the Tenth Circuit Court of Appeals denied Petitioner's Application to Assume Original Jurisdiction and Petition for Writ of Mandamus and or Prohibition on February 10, 1989. Pursuant to 28 U.S.C. § 2101(c), Petitioner has ninety days from the entry of the Order to bring this original action before the Supreme Court. The basis for federal jurisdiction in the district court is diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1).

Petitioner asserts her constitutional right of due process guaranteed under the Fifth Amendment to the United States

Constitution has been violated by the trial court's action. The trial court consolidated Petitioner's cases based upon Petitioner's failure to respond to the Motion one day before a timely response was due. Thus, Petitioner was not given the basic procedural guarantees of notice and opportunity to be heard.

The case involves the provisions of the Fifth Amendment and Rule 6(a), (e) Fed.R.Civ.P. (28 U.S.C.) The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation.

The pertinent portions of Rule 6, Fed.R.Civ.P., (28 U.S.C.) are set forth in the Appendix.

STATEMENT OF THE CASE

Prior to September 8, 1988, your Petitioner, Twylah Sue Hooker, was a Plaintiff in two suits filed in the Eastern District of Oklahoma. The first suit, captioned Twylah Sue Hooker v. Continental Life Insurance Company, a Texas corporation, case number 88-171-C, was filed April 6, 1988. The second case, captioned Twylah Sue Hooker v. Transport Life Insurance Company, a Texas corporation, case number 88-435-C, was filed August 1, 1988. The Continental Life action claimed damages for a breach of an insurance contract, failure to act in good faith, and intentional infliction of emotional distress. The Transport

Life action claimed a vicarious responsibility for the actions of Continental Life, intentional and negligent infliction of emotional distress, and outrageous conduct.

On August 25, 1988, the Defendant, Transport Life, filed a Motion to Dismiss, Motion to Strike, Motion to Transport/Change Venue, Motion to Consolidate, and Memorandum of Law in Support Thereof in case number 88-435-C. The Motions and Briefs were received in Petitioner's attorney's office August 26, 1988. Petitioner filed a Response in the district court to Defendant's Motion on September 9, 1988. However, on September 8, 1988, the United States District Court for the Eastern District of Oklahoma, through Judge Frank H. Seay, granted the Motion of the Defendant, Transport Life to consolidate that case with case number

88-171-C upon Plaintiff's "failure to respond". Under the local court rules and the Federal Rules of Civil Procedure, Petitioner's Response was due September 9, 1988, one day after the Court made its ruling based upon the Plaintiff's failure to respond. Petitioner filed a Motion and Brief requesting a reconsideration of the Court's ruling which was denied on September 28, 1988.

Petitioner asserts the said Order entered by the Honorable Frank H. Seay in the first instance, and by the Honorable H. Dale Cook on reconsideration is in direct contravention with both the Eastern District of Oklahoma's local rules and the Federal Rules of Civil Procedure. Said Order has denied this Petitioner her due process by the Court's failure to follow said rules permitting said Petitioner to respond to the Motion

to Consolidate. Petitioner further states that one of the district judges has made a practice of ruling on motions within ten calender days of filing in direct contravention of the local rules and the Federal Rules of Civil Procedure. (See Affidavit of Walter D. Haskins in Appendix to this Brief.)

The Tenth Circuit found that although the Petitioner had been denied due process by the Respondent's failure to follow the rules of procedure, the challenged action was insufficient to show "manifest non-compliance" or "persistent disregard" of the rules, such as to justify supervisory mandamus. The court further found that there was no showing that the underlying interlocutory order will be unreviewable on appeal from a final judgment.

Petitioner further shows this Court

that she is without any adequate remedy at law, and that a remedy by appeal or any other method except by mandamus or prohibition in this Court is inadequate or insufficient.

Plaintiff/Petitioner objected to consolidation of the two cases on the grounds that the same would delay trial in the matter previously filed, which trial date was set for December 2, 1988. Further, Plaintiff/Petitioner argued that consolidation would inject additional issues into the case which would serve merely to confuse the jury to the Plaintiff's prejudice, primarily the complex and factually distinct issue of the corporate relationship between Continental and Transport. Plaintiff/Petitioner further noted that the Scheduling Order in case number 88-171-C stated that no joinder of claims or

parties would be permitted after June 15, 1988, and that discovery would be completed by August 1, 1988. Petitioner further noted that there were distinct and separate torts alleged against Defendant, Transport.

In her Motion to Reconsider, Plaintiff/Petitioner noted that Rule 14 of the Rules of the United States District Court for the Eastern District of Oklahoma allows memoranda in opposition to motions to be filed within ten days after the filing of the motion. Rule 14 of the Rules of the United States District Court for the Eastern District of Oklahoma states as follows:

> Each motion, application, and objection filed shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion and objection shall be filed within ten (10) days after the filing of the motion or objection,

> and any reply memoranda shall be filed within ten (10) days thereafter. Failure to comply with this paragraph will constitute waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings.

Rule 11 of the Rules of the United States District Court for the Eastern District of Oklahoma states as follows:

> The computation of any period of time prescribed or allowed by these Rules shall be in accordance with Rule 6, Federal Rules of Civil Procedure.

Rule 6(a) of the Federal Rules of Civil Procedure states in pertinent part:

> When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

That Rule further indicates that Labor Day is a legal holiday.

Plaintiff/Petitioner noted that the Defendant's Motion was filed Thursday, August 25, 1988. Since the local court

rules require a response within ten days, and ten days is less than eleven days, intermediate Saturdays, Sundays, and legal holidays must be excluded from any time computation. The responsive pleading became due on Friday, September 9, 1988. Under the Federal Rules, this is computed as follows: the first day counted is Friday, August 26, 1988. The 27th and 28th of August are a weekend and therefore are to be disregarded. The next five days to be counted are between August 29th and September 2nd. September 3rd, 4th, and 5th must be disregarded as these occurred over the Labor Day weekend. Thus, the response was due and filed on September 9, 1988. Therefore, the Order granting Defendant's Motion to Consolidate on the grounds that a Response was not timely filed is simply not supported by the local court rules

and the Federal Rules of Civil Procedure. It is clearly erroneous.

ARGUMENT AND AUTHORITIES

THE SUPREME COURT OF THE UNITED STATES HAS SUPERVISORY CONTROL OF THE DISTRICT COURT

In La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the United States Supreme Court affirmed the use of mandamus in terms that expressly approve an exercise of supervisory control of the District Courts by the Courts of Appeals. Therein, the Court stated:

> We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue Writs of Mandamus in the exceptional circumstances existing here. 352 U.S. at 259-260, 77 S.Ct. 315. Further, Writs have been authorized where there has been a persistent disregard of the Rules of Civil Procedure. Roche v. Evaporated Milk Assoc., 319 U.S.

21, 31, 63 S.Ct. 938, 944, 87 L.Ed. 1185 (1943).

Petitioner respectfully submits that the judges of the United States District Court for the Eastern District of Oklahoma have persisted in a course of conduct by ruling on matters before responses are filed in direct contravention of the Eastern District's own local court rules and the Federal Rules of Civil Procedure. Said practice has denied this Petitioner and others due process of law to such an extent as to require this Court to exercise its supervisory power over the respondent judges of the United States District Court for the Eastern District of Oklahoma, and to issue its Writ of Prohibition prohibiting such practice in the future, and by entering a Writ of Mandamus compelling the Court to

determine Plaintiff/Petitioner's Objection to Motion to Consolidate on the merits.

Mandamus relief is appropriate "[w]here the subject concerns the enforcement of the * * * [r]ules which by law it is the duty of this court to formulate and put in force, * * *" LaBuy v. Howers Leather Co., 352 U.S. at 256. Mandamus will issue to prevent actions outside the scope of the rules and to restrain a district judge from nullifying the same. In Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). These factors are: (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief; (2) the Petitioner will be damaged in a way not correctable on appeal; (3) the District Court's Order is clearly erroneous as a matter of law; (4)

the Order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the Order raises new and important problems, or issues of law of first impression. Bauman, supra, 557 F.2d at 654, 655. Mandamus is appropriate even though the five factors do not all point in the same direction; indeed, only rarely will both of the last two factors be present. United States v. Harper, 729 F.2d 1216, 1222 (9th Cir. 1984). In that case, the Court stated:

> As we have noted, these considerations 'are cumulative and proper disposition will often require a balancing of conflicting indicators.' Although we have never granted the writ on the basis of only one of the guidelines, or when most of the guidelines pointed against issuing the writ, we have emphasized that the guidelines 'are not meant to supplant reasoned and independent analysis by appellate courts.' Rather, they 'serve only as a useful starting point, an analytic frame work for determinations regarding the propriety of mandamus relief.'

(Citations omitted).

We will discuss the five factors in order. The first factor, the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief she desires is met in this case. The specific order is a non-appealable interlocutory order. It has not been certified for direct appeal. Also, it is not the type of order which can be adequately reviewed on appeal from a final judgment.[1] Review is justified by the necessity for "proper judicial administration in the federal system." LaBuy v. Howers Leather Co., 352 U.S. 249, 259-260 (1957)

The second factor is closely related to the first guideline. The facts of

---

[1]Note, Supervisory and Advisory Mandamus under the All Writs Act, 86 Harv.L.Rev. 595, 611 (1973)

this case clearly show that the second factor is met. Absent some ruling from this Court, Petitioner has no way of knowing when responses to pleadings are due in the Eastern District. Petitioner knows that the Eastern District does not follow their own local court rules or the Federal Rules of Civil Procedure in this regard. It is unclear to this Petitioner, however, how the Eastern District determines when a pleading is timely filed. Because discovery disputes are ongoing, it is clear that Petitioner, by filing timely responses under the local rules and the Federal Rules of Civil Procedure will continue to be prejudiced by the Court's failure to follow the rules. Such prejudice will result in Petitioner being denied due process of law in that the Court may continue to enter orders upon

Petitioner's "failure to respond."

The third factor is also met. Both the local rules and the Federal Rules of Civil Procedure note when a response must be filed and how the response time must be calculated. The Court's Order of September 8, 1988, was entered one day before a responsive pleading was due and was based on "Plaintiff's failure to respond." The Order entered one day before a timely response was due is, therefore, clearly erroneous.

The fourth factor, that the District Court's Order is an oft-repeated error or manifests a persistent disregard of the Federal Rules is also apparent under the facts of this case. Apparently, the District Court has instituted a practice of ruling upon motions prior to the time that a response is due under the Eastern District's own rules and the Federal

Rules of Civil Procedure. This is not a case where the local court rules are in contravention with the Federal Rules, but rather, that the practice of the Eastern District is to simply ignore the plain meaning of its local court rules and the Federal Rules of Civil Procedure.

The fifth factor is not present. In Valley Broadcasting Co. v. U.S. District Court of District of Nevada, 798 F.2d 1289 (9th Cir. 1986), the Court noted: "In fact, it is difficult to envision a case that involves both an oft-repeated error as well as an issue of law of first impression." 798 F.2d at 1292. Thus, even though all five factors are not indicated, the writ is appropriate.

In Daiflon, Inc. v. Bohanon, 612 F.2d 1249 (10th Cir. 1979), the Tenth Circuit noted the general standards and requirements for a Writ of Mandamus to

issue pursuant to the Court of Appeals' supervisory power over the district courts. Therein the Court stated:

> Little encouragement for use of writs is to be derived from the Supreme Court decisions even for supervisory purposes, although the Supreme Court has approved its use to review interlocutory orders where the judge being supervised has 'displayed a persistent disregard of the [Federal] Rules of Civil Procedure' so as to justify exercising supervisory authority to control his conduct. . . . 612 F.2d at 1254.

In Daiflon, the Tenth Circuit was asked to issue a writ to prevent further proceedings by the trial judge who granted a new trial of all issues in an antitrust action. The Tenth Circuit issued the writ directing the trial court to limit the new trial to the issue of damages. That case was reversed, the Supreme Court holding that a trial court's ordering of a new trial rarely, if ever, will justify the issuance of a

Writ of Mandamus. The Supreme Court further noted that the litigant is free to seek review of the propriety of such an order on direct appeal after final judgment has been entered. See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). It is clear, however, that such a writ is permissible where the district court shows a persistent disregard of the Federal Rules of Civil Procedure.

Further, the Supreme Court has supervisory power over the district court's local rules. Where such local rules are violative of due process, writs have been issued. See, e.g., Frazier v. Hiebe, ___U.S.___, 107 S.Ct. 2607 (1987) and cases cited therein.

A recent Oklahoma Supreme Court decision is very much on point. In that case, Lewis v. Arbuckle Wilderness, Inc.,

763 P.2d 90 (Okl. 1988), the Oklahoma Supreme Court vacated an order granting summary judgment where the order was entered prior to a timely filed response in a slip and fall action. On August 29, 1986, the defendant filed a Motion for Summary Judgment which the plaintiff responded to on September 9th and 11th. On September 12th the Court overruled the Motion for Summary Judgment because it was served less than twenty days before trial date. The trial date was then continued and on November 17, 1986, defendant filed a second Motion for Summary Judgment. That motion was similar to the earlier motion but not identical to it. It was served upon the plaintiff's counsel November 18th and on December 2nd, within the fifteen days allowed by the Court rules, plaintiff filed her response to the motion. The

trial court, however, had entered an order sustaining the Motion for Summary Judgment on December 1st and dismissed plaintiff's case. The Oklahoma Supreme Court stated:

> We do not believe that due process is satisfied by a court 'anticipation' of what a later timely filed response would offer, even where the anticipation may later be shown to have been accurate. 763 P.2d at 91

The Court then quoted from a previous case stating:

> . . . **The appearance of justice is often as important as the proper administration of justice**. The purpose and policy of the law is that a judge should afford to every person legally interested in a proceeding the full right to be heard according to law. If the Court sets a deadline when the case will be decided, and the opportunity to present authority to support the litigant's position is denied by premature entry of judgment, the judgment should be vacated upon a timely application to do so. (emphasis by Court). 763 P.2d at 91, 92

This is a similar situation to what

has occurred in the instant case. The Court, by entering an order prior to the time a timely filed response was received has denied this Petitioner due process. The Order, therefore, should be vacated. Further, such actions by the district court undermine the concepts of justice and due process, and the belief in the judicial system. Clearly, such action should not remain unchallenged.

The Supreme Court has stated that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). Supervisory control of District Courts is necessary to proper judicial administration in the federal system and mandamus is appropriate for the exercise of that supervisory control necessary to proper judicial administration. See, La Buy v. Howes Leather Co., 352 U.S. 249,

259-60, 77 S.Ct. 309, 315-316 (1957); Goldblum v. National Broadcasting Corp., 584 F.2d 904, 906 (9th Cir. 1978). The Petitioner in In Re Dalton, 733 F.2d 710 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185, 105 S.Ct. 947, 83 L.Ed.2d 959, sought a Writ of Mandamus on the basis of denial of due process where the district court transferred the case without a hearing. Therein the Court stated:

> . . . Dalton is evidently contending that mandamus should issue under these circumstances because the allegation of denial of due process raises issues and problems of peculiar public importance involving disregard of federal rights. 733 F.2d at 718.

The Court noted that the cases the Petitioner cited evidenced the appellate courts' explicit refusal to hold that a hearing is necessarily required on every transfer motion. The Court then stated:

> Rather, the decisions stand for the proposition that 'the failure to

> provide notice and an opportunity to be heard to the party opposing transfer (constitutes) a violation of due process and (can) be remedied by granting a Writ of Mandamus to secure vacation of the transfer order.' 733 F.2d at 718 (citations omitted).

This case does not revolve around the propriety of the district court's failure to grant a hearing on the Motion to Consolidate. Rather, the issue is whether the district court denied the Petitioner due process by entering an Order consolidating the cases based on Petitioner's failure to respond prior to the time a timely response was required under the Court's own rules. Where the appearance of justice is destroyed, it casts doubt on the integrity of the judicial process and impairs the confidence of the public in the administration of justice. United States v. Donahue, 574 F.Supp. 1269 at 1275

(D.Md. 1983).

A district court's rule making authority is derived from Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2071. Rule 83 and Section 2071 prohibit a district court from issuing local rules which are inconsistent with the Federal Rules of Civil Procedure, Acts of Congress, and rules of practice and procedure prescribed by the Supreme Court. "A local rule is inconsistent with federal rules and statutes if it alters those aspects of the litigation process which bear upon the ultimate outcome of the litigation, thereby frustrating federal policies." Williams v. United States District Court, 658 F.2d 430, 435 (6th Cir. 1981), cert. denied, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116. In this case, Petitioner does not argue that the local rule itself is

unconstitutional. Rather, Petitioner argues that the non-application of the local rules are unconstitutional by denying this Petitioner due process of law. It is clear by the district court's rulings, that Petitioner may not rely upon the local rules as written. Petitioner, therefore, is put under a continuing disability in the Eastern District by being unable to determine from the rules when a timely response is due.

Certainly, the District Court's failure to follow its own rules must be deemed an abuse of discretion requiring this Court to exercise its supervisory control over the District Court.

The Tenth Circuit indicated that the Petitioner made a credible allegation that the Respondent had failed and refused to follow the rules of procedure

in that the Petitioner may have been denied fair opportunity to be heard. The Tenth Circuit concluded by stating that the Petitioner failed to demonstrate that the challenged action represented manifest non-compliance or persistent disregard of the rules, or that the underlying Interlocutory Procedural Order will be unreviewable on appeal from a final judgment. In this regard the Tenth Circuit clearly erred. The Affidavit attached to the Petition for Writ of Prohibition indicates that there was a practice of ruling upon motions within ten calender days, rather than within the time prescribed by both the local court rules and the Federal Rules of Civil Procedure. Further, since the case is ongoing, Petitioner cannot safely rely upon the Court rules to calculate her time to respond to various motions, but

must respond within ten calender days to insure that further "default" orders are not entered against her. The cases certainly evidence a situation where immediate review will be justified by the necessity for "proper judicial administration in the federal system." La Buy v. Howes Leather Co., 352 U.S. 249, 259-260 (1957). Finally, an Order consolidating the cases without giving Petitioner her rights of notice cannot be adequately reviewed on appeal. Consolidation pursuant to Rule 42 of the Federal Rules of Civil Procedure is within the sound discretion of the trial court. Although the **Order** consolidating the cases is an abuse of discretion because Petitioner was not allowed to respond, the **fact** of consolidation and the effect it may have on the trial itself is difficult to determine and

would be impossible to prove on appeal. The problems of proof of harm make such an order beyond the reach of the regular appellate process and, therefore, justifies the extraordinary relief sought.

The facts in this Petition are undisputed. The trial court has neither denied that an Order was entered one day prior to the time a response was due from this Petitioner, nor that there is a policy of ruling on such motions within ten calender days, regardless of the Eastern District's own local rules or the Federal Rules of Civil Procedure.

THOMAS, GLASS, ATKINSON, HASKINS, NELLIS & BOUDREAUX

S/

Walter D. Haskins, OBA #3964
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877

CERTIFICATE OF SERVICE

This is to certify that on this the 24 day of March, 1989, three true, correct and exact copies of the above and foregoing instrument was mailed to: Honorable H. Dale Cook, Federal Courthouse, Muskogee, OK 74401; Honorable Frank H. Seay, Federal Courthouse, Muskogee, OK 74401; Ms. Elsie Draper, Attorney for Defendant, Continental Life, 20th Floor, Fourth National Bank Building, Tulsa, OK 74119; Mr. J. Kent Davenport, 2323 Bryan Street, Suite 2050, Dallas, TX 75201, Mr. Robert Hoecker, Clerk, Tenth Circuit Court of Appeals, C404 U.S. Courthouse, 1929 Stout Street, Denver, CO 80294; and Ms. Mary Quinn-Cooper, Rhodes, Hieronymus, Jones, Tucker & Gable, Attorney for Defendant, Transport Life, 4th National Bank Building, Tulsa, OK 74119, with proper postage thereon fully prepaid.

SJ

376-91/JRN/mh

APPENDIX

APPENDIX

"A" Order of the Court of Appeals dated February 10, 1989

"B" Notice of Minute Order dated September 8, 1988

"C" Motion to Reconsider

"D" Notice of Minute Order dated September 28, 1988

"E" Affidavit of Walter D. Haskins

"F" Rules 6. Time

"G" Rule 1. Rules of procedure; scope of rules; Rule 11. Time; and Rule 14. Motions, applications and objections

February 10, 1989

Before Honorable Stephen H. Anderson, and Honorable Deanell Reece Tacha, Circuit Judges, United States Court of Appeals

TWYLAH SUE HOOKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 88-2804**
	)	
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA,	)	
	)	
Respondent.	)	

The court has been advised that Chief Judge Seay has declined to respond to the petition for writ of mandamus and/or prohibition and application to assume original jurisdiction.

Petitioner seeks an order of this court compelling the respondent court to adhere to certain provisions of the Federal Rules of Civil Procedure and the rules of the respondent district court. There is, in this case, a credible allegation that respondent has

"A"

failed or refused to follow the rules of procedure and that petitioner may have been denied fair opportunity be heard. However, we conclude that the showing made by petitioner is insufficient to demonstrate the challenged action is a "manifest noncompliance" or "persistent disregard" of the rules. See Will v. United States, 389 U.S. 90, 99 (1967); In re Dalton, 733 F.2d 710, 717 (10th Cir. 1984). In addition, there is no showing that the underlying interlocutory procedural order will be unreviewable on appeal from a final judgment. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). Accordingly, the petition for writ of mandamus and/or prohibition and application to assume original jurisdiction are both denied.

ROBERT L. HOECKER, Clerk

By:
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TWYLAH SUE HOOKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 88-435-C**
	)	
TRANSPORT LIFE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

NOTICE OF MINUTE ORDER

You are advised that the following Minute Order was entered in the above case on the 8th day of September, 1988.

ENTERING ORDER: Granting Motion of Defendant, Transport Life Insurance Company, to Consolidate with Case No. 88-171-C, upon plaintiff's failure to respond. **IT IS FURTHER ORDERED** that this case is transferred to the Honorable Judge H. Dale Cook and case 88-435-C will be governed by the scheduling dates set in case 88-171-C. (FHS)

LEWIS L. VAUGHN, Clerk
U.S. DISTRICT COURT

By: David L. McElvania
Deputy

cc. Walter D. Haskins
Galen Brittingham
Mary Quinn-Cooper
Elsie Draper

"B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TWYLAH SUE HOOKER, Plaintiff,	)	
vs.	)	No. 88-171-C
TRANSPORT LIFE INSURANCE COMPANY, Defendant.	)	

MOTION TO RECONSIDER

COMES NOW the Plaintiff, Twylah Sue Hooker, by and through her attorneys of record, Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux, and hereby requests that the Court reconsider its Minute Order of September 8, 1988. Said Order granted the Motion of the Defendant, Transport Life Insurance Company to consolidate this action with case number 88-171-C "upon Plaintiff's failure to respond". Plaintiff respectfully submits that under the local court rules and under the Federal Rules of Civil Procedure a response was not due

"C"

until September 9, 1988, and that therefore, the Court should consider the issue on the merits. A Brief in Support of this Motion is filed contemporaneously herewith. Plaintiff also has deposited with the Court Clerk her objections to Defendant's Motions contemporaneously with the filing of this Motion.

Respectfully submitted,
THOMAS, GLASS, ATKINSON, HASKINS, NELLIS & BOUDREAUX

\s\Jody R. Nathan
Walter D. Haskins, OBA #3964
Jody R. Nathan, OBA #11685
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877

CERTIFICATE OF SERVICE

This is to certify that on this the 9th day of September, 1988, a true, correct and exact copy of the above and foregoing instrument was mailed to: Ms. Mary Quinn-Cooper, Rhodes, Hieronymus, Jones, Tucker & Gable, Attorney for Defendant, 4th National Bank Building, Tulsa, OK 74119, with proper postage thereon fully prepaid.

\s\Jody R. Nathan
333-140/JRN/mh

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TWYLAH SUE HOOKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No.88-171-C
	)	
CONTINENTAL LIFE INSURANCE COMPANY,	)	No.88-435-C
TRANSPORT LIFE INSURANCE COMPANY,	)	CONSOLIDATED
	)	
Defendant.	)	

NOTICE OF MINUTE ORDER

You are advised that the following Minute Order was entered in the above case on the 28th day of September, 1988.

ENTERING ORDER: Denying Motion of Plaintiff to Reconsider Order Consolidating Cases. (HDC)

LEWIS L. VAUGHN, Clerk
U.S. DISTRICT COURT
By: David L. McElvanie
Deputy

cc: Walter D. Haskins
Elsie Draper
J. Kent Davenport
Mary Quinn-Cooper

"D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TWYLAH SUE HOOKER,	)	
	)	
Petitioner,	)	
	)	No.
	)	
	)	
v.	)	
	)	
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA,	)	
	)	
Respondent.	)	

AFFIDAVIT

I, Walter D. Haskins, being first duly sworn, and of lawful age, do state of my own personal knowledge and belief the following:

1. I am the attorney for Twylah Sue Hooker, Petitioner herein;

2. That on or about September 9, 1988, I had a telephone conference with Lewis Vaughn, Clerk of the United States District Court for the Eastern District of Oklahoma;

"E"

3. That during that conversation I was advised that Judge Seay had sustained Defendant, Transport Life Insurance Company's Motion to Consolidate prior to the time Petitioner's response was due according to the local court rules and the Federal Rules of Civil Procedure;

4. That Mr. Vaughn indicated to me that he was aware of the local and federal rules, but stated that Judge Seay of the United State District Court for the Eastern District of Oklahoma makes his rulings upon motions after ten calendar days, irrespective of the requirements of the Rules of the United States District Court for the Eastern District of Oklahoma, and the Federal Rules of Civil Procedure.

Further affiant saith not!

\s\Walt Haskins
WALTER D. HASKINS

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 17th day of November, 1988.

\s\Ann Lindsey
Notary Public

My Commission Expires:

3-23-91

(SEAL)

376-91/JRN/mh

Rules 6. Time

(A) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the Untied States, or by the state in which the district court is held.

(e) **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is

served upon him by mail, 3 days shall be added to the prescribed period.

Rule 1. Rules of procedure; scope of rules

(a) The rules of procedure in any proceeding in this Court shall be as prescribed by the laws of the United States, the rules of the Supreme Court of the United States, the Federal Rules of Civil Procedure, the Federal rules of Criminal Procedure, any applicable Rules of the United States Court of Appeals for the Tenth Circuit, and these Rules.

(b) Where in any proceedings or in any instance there is no applicable rule of procedure, a Judge may prescribe same.

(c) These Rules may be cited as Local Court Rules.

(d) These Rules shall govern all proceedings brought in this Court after they take effect. They shall also apply to all proceedings pending at the time they take effect, except to the extent that in the opinion of the court the application thereof would not be feasible or would work injustice, in which event the former Rules shall govern.

(e) A Judge, in any civil or criminal case, may in his discretion waive any requirement of these Rules when in his opinion the administration of justice requires such waiver. provided, however, he may not waive any provision of the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, unless he is so authorized by such Rules.

Rule 11. Time

The computation of any period of time prescribed or allowed by these Rules

shall be in accordance with Rule 6, Federal Rules of Civil Procedure.

Rule 14. Motions, applications and objections

(a) **Briefs.** Each motion, application and objection filed shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion and objection shall be filed within ten (10) days after the filing of the motion or objection, and any reply memoranda shall be filed within ten (10) days thereafter. Failure to comply with this paragraph will constitute waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings.